85-361

No.

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1984

IRVING R. BYKOFSKY,

Petitioner,

vs.

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

The question presented is whether ordinary contract rights—in this case a written pledge of cooperation by the president of petitioner's public employer to enable petitioner to retire on a 25 year service basis in November 1982—are not of themselves "property" entitled to the procedural and substantive due process protections of the Fourteenth Amendment of the Constitution of the United States?

The opinion of the intermediate appellate court, 107 AD2d 779; 484 N.Y. Supp. 2d 839 (App. Div. 2d Dept., 1985) whose affirmance by the Court of Appeals of the State of New York, 65 NY2d 730 (1985), was explicitly made "for the reasons stated in the memorandum at the Appellate Division" holds otherwise:

> "Plaintiff's alleged personal informal understanding with Dr. Hess concerning his retention for the next two successive academic years does not assume the dimensions of a constitutionally protected property interest, created by statute, regulation or government policy which can form the basis for a cognizable claim pursuant to section 1983 of title 42 of the United States Code for violations of his right to due process of law."

This 42 U.S.C. §1983 case was, in accord with *Maine v. Thiboutet*, 448 U.S. 1 (1980), brought in State court after Dr. Hess, on two months' notice, terminated petitioner as of the end of the annual contract covering Dr. Bykofsky's 24th service year and denied his immediate request for a grievance hearing seeking reappointment on an annual contract covering the 25th service year. The trial court, at Special Term,

found petitioner entitled to a hearing as to the making of the contract between petitioner and the college president, but the Appellate Division reversed and dismissed the complaint, a decision which the Court of Appeals affirmed for the above stated reason.

In secondary support for their decision, the appellate courts found the contract of April 30, May 1, 1980 unenforceable under New York's statute of frauds (McKinney's Cons. Laws of New York, Vol. 23A, General Obligations Law, §5- 01, subd. a, par. 1). While petitioner challenges the correctness of that holding as a defense to this federal action, we feel that predictions of whether the cause will ultimately prevail or not are transcended by the manifest importance and need of a ruling by this Court with respect to New York's massive extraction of contract rights from the realm of "property" covered by the Fourteenth Amendment's due process clause.

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IN THE
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ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the order and final judgment of the Court of Appeals of the State of New York of June 6, 1985 summarily affirming the order of dismissal herein of the Supreme Court of the State of New York, Appellate Division, Second Department, dated January 28, 1985, said affirmance being for the reasons stated in the memorandum opinion of said Appellate Division, 107 AD2d 779, 484 N.Y. Supp. 2d 839.

OPINIONS BELOW

The memorandum decision of said Court of Appeals, dated June 6, 1985, is reported at 65 NY2d 730; __ N.Y. Supp. 2d __. Its text is set forth in Appendix 1 of this petition.

The opinion herein of the Supreme Court of the State of New York, Appellate Division, Second Department, dated January 28, 1985, is reported at 107 AD2d 779; 484 N.Y. Supp. 2d 839. Its text is set forth in Appendix 2 of this petition.

The memorandum order of the Supreme Court of the State of New York, County of Kings, at Special Term, dated September 12, 1983, is not published. It is found in the file of the case in the office of the County Clerk of Kings County under index number 12728/1982. Its text is set forth in Appendix 4 of this petition.

JURISDICTION

The final judgment herein of the Court of Appeals of the State of New York is dated and was entered June 6, 1985. No application for rehearing was made, and neither has an application for an extension of time to petition for certiorari herein been made.

Petitioner believes that this Court has jurisdiction to entertain this petition under 28 U.S.C. §1257(3).

REASON FOR GRANTING THE WRIT

In conflict with the applicable decisions of this Court, the Court of Appeals of the State of New York has here decided that ordinary contracts are incapable, in and of themselves, of generating property interests which can form the basis for a cognizable claim under 42 U.S.C. §1983 for violation of Fourteenth Amendment due process protections.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Fourteenth Amendment, section 1:

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, as amended

42 U.S.C. §1983:

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L. 96-170, §1, Dec. 29, 1979, 93 Stat. 1284.

42 U.S.C. §1988:

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of thit title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. §722; Pub.L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, §205(c), Oct. 21, 1980, 94 Stat. 2330.

McKinney's Consolidated Laws of New York, Vol. 23A, General Obligations Law §5-701, subd. a, par. 1:

§5-701. Agreements required to be in writing

a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime;

STATEMENT OF THE CASE

In the Spring of 1980 petitioner confronted a dilemma in the economic management of a medical disaster that had overtaken his family. His wife had become afflicted with complete and irreversible renal failure necessitating life-sustaining continuous ambulatory peritoneal dialysis.

At that time he was serving as Director of Community Affairs at Brooklyn College, a higher education facility of the City of New York. Unlike the teaching faculty, Bykofsky's high administrative position drew no tenure but instead was governed by annual contracts running from July 1st of the contract year through the ensuing June 30th. Appointment, reappointment and termination at the end of a contract year all depended on the effective written notice of the college president. Such notice, after the initial year, was required by regulation to be given "on or before May 1."

Bykofsky's contract ending June 30, 1980 marked his 23rd pensionable service year—with credit for accrued leaves, the service anniversary and retirement would coincide in November. But retirement at that

time would only compound his problems; he desperately needed to work through and qualify for a 25 year service retirement in November 1982.

A 23 year service pension would yield approximatley 20% less in periodic payments than retirement based on service of 25 years. But far worse, while a 25 year retirement would provide unbroken continuity in medical benefits, any earlier retirement would cause them to lapse for the period of deficit in 25 year service.

The college president, Dr. Hess, was relatively new to Brooklyn College and Dr. Bykofsky's preliminary approach was to enlist the aid of influential friends to discuss his problem with the president. Thereafter, on April 30, 1980, Dr. Bykofsky met with president Hess and Bykofsky's affidavit attests:

> "14. In any event I had a long and detailed conference with defendant Hess on April 30, 1980 in which we discussed in considerable detail not only my firm need to retire in November 1982 but the implementation of that retirement date through two successive reappointments for annual terms, and the channeling of my work as Director of Community Affairs through new lines of authority. I assured Dr. Hess that I would not try to back out from November 1982 retirement and he, in turn, assured me that as long as I did my work he would, for the successive two years, keep me reappointed in my position. I distinctly remember Dr. Hess saying to me:
>
> 'Don't worry, when the time comes to retire, you'll be able to retire with honor and dignity.'
>
> "15. Towards the end of the conference we discussed how it would be memorandized and it was

agreed that I would write a letter announcing my intention to retire in November, 1982 and he would respond in letters 1) reappointing me for the 1980/1981 contract year, 2) aligning my position of Director of Community Affairs under the jurisdiction of Professor Edward Rogowsky of the Office of Neighborhood Affairs of the Center for the Study of Brooklyn, and 3) indicating his cooperation in effectuating my November 1982 retirement. It was not until *after* our conference of April 30, 1980 that any of the letter memoranda were drafted, mine dated April 30, 1980, and three written and signed by Dr. Hess, all dated May 1, 1980. These documents were inter-office communications and did not go through the mails."

To which Dr. Hess attested in reply:

"2. On April 30, 1980 I met with Plaintiff, Irving Bykofsky. At that time Plaintiff held the position of Higher Education Officer, an excluded employee with a one year appointment ending on June 30, 1980.

"3. At the meeting in question, Plaintiff discussed his personal situation and his desire to remain as an employee of the college for at least two additional years until November 1982 in order for him to reach the twenty-five year pension requirement.

"4. I agreed to review Plaintiff's contract for the 1980-81 academic year and asked him to submit his future 'plans' in writing.

"5. I never agreed to reappoint Plaintiff for two successive one year contracts beginning July 1, 1980 and ending June 30, 1982.

"6. The exchange of letters annexed to Plaintiff's motion papers in no way were intended to memorialize any such alleged oral agreement because there was in fact no agreement."

In the exchange of signed letter-memoranda on letterheads of Brooklyn College, the two items most directly bearing on a venture of cooperation to achieve a November 1982 retirement for Bykofsky are Bykofsky's letter to Hess dated April 30, 1980:

"Dear President Hess:

May I take this opportunity to congratulate you, and Brooklyn College, upon your investiture as President. I know that your leadership will help restore the college to the level of scholarly accomplishment it so richly deserves.

I am writing this note to let you know of my intent to retire from the CUNY system at the earliest date possible in November of 1982. The pressures of personal problems (especially the health of my wife) dictate this course of action.

You may be assured that, until that date, I shall endeavor to serve you and the college to the best of my ability.

Thanking you for your kind understanding and with best wishes for the future I remain

Respectfully yours,
sgd/ Irving R. Bykofsky"

And the president's response dated May 1, 1980:

"Dear Dr. Bykofsky:

Thank you for your letter of April 30 and your good wishes. I have great faith in the future of Brooklyn College.

I appreciate your letting me know of your intention to retire in November of 1982. Will you please keep me informed as your plans materialize so that we may plan appropriately.

Sincerely,
sgd/ Robert L. Hess"

Of the two other letters of president Hess to Bykofsky, each dated May 1, 1980, one realigned the channels of authority and report for the position of Director of Community Affairs, and the other lays to rest the notion that Bykofsky is relying on two oral promissory undertakings by Hess to reappoint him for two successive one year terms. This latter letter reads in pertinent part:

"Dear Dr. Bykofsky:

I am pleased to inform you that I am recommending to the Board of Trustees of The City University of New York that you be reappointed for the period July 1, 1980 through June 30, 1981 as *** Director of Community Affairs.***"

Thus, putting out of mind what is necessarily implied in a letter requesting retention in employment until November 1982 retirement and a response mentioning the retirement date and pledging joint appropriate planning to that end, the only explicitly oral promise claimed for the college president, made on April 30, 1980, is the necessarily ministerial and implementing act of giving the notice of appointment—without which all the written, unambiguous plans and arrangements could not possibly materialize—a promise which, made on April 30, 1980 was perfectly capable of being performed within the year thereafter for timely reappointment for the 1981/1982 contract year.

What this college president, a role model for the young in his college of liberal arts and the humanities, did thereafter is brutal. Under date of April 27, 1981,

President Hess wrote to Dr. Bykofsky:

> "Dear Mr. Bykofsky:
>
> I regret to inform you that after careful consideration I am unable to recommend you to the Board of Trustees of The City University of New York for reappointment as Higher Education Officer/Assistant Administrator/Director of Community Affairs beyond June 30, 1981."

Without warning or opportunity to reposition himself, Hess had cut Bykofsky off in his 24th service year.

Bykofsky immediately protested the breach of their agreement and requested a grievance hearing with the remediation of reappointment under contract covering the July 1, 1981 through June 30, 1982 academic year.

Hess' reply was to deny Bykofsky any opportunity for a prior hearing; further, and reversing prior practice where credit for leaves was given and paid *following* the June 30 contract completion date, Bykofsky was ordered not to report for work from May 19, 1981, and told that his accrued annual leave, *in lieu of pay,* would be paid for the balance of the contract term, a procedure that advanced his retirement to the end of September as against what would ordinarily continue payroll coverage into November, all with an absolute loss of six weeks pay. In a parallel contemporary case, the State unemployment insurance administration ruled that Brooklyn College's forcing leave to be taken within and at the expense of the contract term constituted a termination of employment initiating a period of compensable

unemployment, and that the leave compensation constituted severance pay rather than salary.

Later in 1981, this suit was begun in the Supreme Court of the State of New York in and for the County of Kings.

STATEMENT PURSUANT TO RULE 21(h) OF THE RULES OF THIS COURT

This is a federal statutory case invoking the Civil Rights Act of 1871, as amended, 42 U.S.C. §§1983, 1988, which, under authority of *Maine v. Thiboutet*, 448 U.S. 1 (1980) was brought in the State trial court, Supreme Court of the State of New York, County of Kings, on a complaint verified December 5, 1981, copy appended hereto as Appendix 6. Respondents made no application to remove the case to the federal district court.

Belying any notion that this is essentially an ordinary common law action for damages for breach of contract as *Bykofsky v. Hess*, 107 AD2d 779, 782; 484 N.Y. Supp. 2d 839, 842, 843 had stated:

> "Plaintiff may not maintain what is essentially a common-law action to recover damages for breach of contract in the form of a civil rights action to redress deprivations of his Federal constitutional rights pursuant to section 1983 of title 42 of the United States Code.",

the complaint prayed:

> "a) Declaratory and injunctive relief directing defendants to reinstate plaintiff forthwith to his former position at Brooklyn College of the City

> University of New York for the balance of the contract year remaining until and including June 30, 1982 unless sooner terminated after a hearing before this Court;"

plus back pay, adjustment of retirement benefits, and counsel fee as well as consequential damages, e.g., reimbursement of medical expenses that should have been covered.

After first putting in an answer, the defendants moved for dismissal to which plaintiff cross-moved for partial summary judgment based on his right to have had a pre-severance hearing. The trial court, at Special Term (Appendix 4) denied the motion to dismiss the complaint and found it to allege a timely, well-pleaded cause under 42 U.S.C. §1983. At the same time petitioner's cross-motion was denied because the papers "raise a triable issue of fact as to the defendants' alleged promise to reappoint the plaintiff for the 1981-1982 school year."

On appeal to the Appellate Division, that Court, on January 28, 1985, reversed Special Term, on the law, for failure to state a cause of action and dismissed the complaint (Appendix 2; 107 AD2d 779, 484 N.Y. Supp. 2d 839). The Court of Appeals of the State of New York, in turn, affirmed the Appellate Division "for the reasons stated in the memorandum at the Appellate Division" (Appendix 1; 65 NY2d 730; __ N.Y. Supp. 2d __; (June 6, 1985). Thus this State court case, *ab initio,* was a 42 U.S.C. §1983 statutory case to vindicate and enforce petitioner's claim to the due process protection accorded by Section 1 of the Fourteenth Amendment of the Constitution of the United States to his property right in the written and signed pledge of the president of his public employer to

cooperate in the retention of his public employment sufficient to attain retirement rights on a 25 year service basis in November 1982, and his oral undertaking of April 30, 1980 to implement that pledge in the only way it could be accomplished, *viz.*, by the ministerial act of giving notice of reappointment for the 1981/1982 contract year on or before May 1, 1981.

We feel that the holding of the highest court of the State of New York that contracts, however inoffensive, cannot of themselves generate property rights of a stature entitling them to the constitutional due process protection accorded to "property" is a very serious abridgement of constitutional right that ought to be reviewed by this Court. In any event the federal sweep of that State court holding is unmistakeable.

ARGUMENT

1. This Court ought to review the holding of a State's highest court which declares that ordinary contracts cannot generate property rights entitled to the due process protections of the Fourteenth Amendment of the Constitution of the United States.

The virtue of the Appellate Division opinion which the Court of Appeals of the State of New York expressly adopted for itself is its unambiguity, 107 AD2d 779, 782; 484 N.Y. Supp. 2d 839, 842, 843:

> "*** Plaintiff's alleged personal informal understanding with Dr. Hess concerning his retention for the next two successive academic years does not assume the dimensions of a constitutionally protected

property interest, created by statute, regulation or government policy which can form the basis for a cognizable claim pursuant to section 1983 of title 42 of the United States Code for violations of his right to due process of law.

Plaintiff may not maintain what is essentially a common-law action to recover damages for breach of contract in the form of a civil rights action to redress deprivations of his Federal constitutional rights pursuant to section 1983 of title 42 of the United States Code. ***"

The true sweep of that holding is realized in considering the exchange of signed correspondence between Hess and Bykofsky wherein Bykofsky pledges:

> "You may be assured that, until that date [November 1982], I shall endeavor to serve you and the college to the best of my ability."

and Hess responds:

> "*** please keep me informed as your plans [for November 1982 retirement] materialize so that we may plan appropriately."

Had Hess added to the words of mutual cooperation the most baldly explicit promise to reappoint Bykofsky for the qualifying 1981/1982 contract year, still, under New York's version of Fourteenth Amendment due process, such contractual undertaking, unprotected by federal constitution and federal enforcing statute, would be unenforceable against the sovereign State, its subdivisions, instrumentalities, and representatives acting in official capacity.

The State courts' statement about the inappropriateness of bringing a common law damage ac-

tion for breach of contract in the trappings of a 42 U.S.C. §1983 action would be quite correct if the common law action was available and appropriate to answer to the due process requirements of the situation. But in the context in which the Appellate Division made it, that observation is altogether too glib. The central issue in this case turns on petitioner's federal constitutional right to a prior due process hearing in the two month interval between the notice and the actual termination, a hearing that was requested and denied. Further, and appropriate to the time at which the action was brought, the principal relief sought in suit was reinstatement to the position for the balance of the 1981/1982 contract term or until prior termination on a proper hearing—certainly not features of common law damage actions for breach of contract. Also completely ignored was the sovereign immunity of respondents to common law actions.

It is therefore plain that what the Court of Appeals of the State of New York has done here is to cast a deep shadow over the contractual undertakings of States and those exercising their powers. Under that doctrine the obligations of their contracts are so impaired that the president of a public college may induce others to sever connections and join staff on an unenforceable promise of time. Unattractively, breaching contracts becomes a positive right of State governments and those acting as government representatives for the perverse reason that rights conferred by contract do

> "*** not assume the dimensions of a constitutionally protected property interest, created by statute, regulation or government policy ***."

That authoritative opinion eliminates *all* contracts from the ambit of due process protection of property rights, regardless of their validity or invalidity, enforceability or unenforceability under State law, and it is here worth reiterating that however unassailable the State judiciary may be in its interpretation and application of its own State law, that apparent absoluteness of power affords the States no cover for destroying and impairing federal constitutional and statutory protections.

In the actualities of constitutional law there can be no valid challenge to the proposition that property rights generated by contracts and valid mutual understandings are as much protected by Fourteenth Amendment due process, procedural and substantive, as property generated by State or federal statute, regulation or government policy. The authorities are legion, but *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) is representative and succinct:

> "*** [a] person's interest in a benefit is a 'property' interest for due process purposes if there are ... rules or mutually explicit understandings that support a claim to the benefit and that he may invoke at a hearing."

We feel that this massive extraction of "property" generated by as important a source as contracts—formal or informal, explicit or implied—from the constitutional protection accorded to property by the due process clause of the Fourteenth Amendment represents a sufficiently grave departure from our constitutional practice so as to warrant review by this Court regardless of the ultimate disposition of the case.

2. The touchstone to the right to a due process hearing prior to separation from public employment is the substantiality of the issues tendered for such a hearing rather than a prediction of the ultimate outcome of the hearing. In such a case to make the ultimate substantive determination as the appellate courts have done here without allowing a prior hearing is to destroy the employee's equally constitutional right to the procedural due process of being afforded the opportunity for such a prior hearing. Without enforcement of procedural due process, no State need take the risk of affording its employees that procedural right.

In *Board of Regents v. Roth*, 408 U.S. 564, 570 (1972), this Court said:

> "*** a weighing process has long been a part of any determination of the *form* of a hearing required in particular situations by procedural due process."

and, at page 577:

> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in Goldberg v. Kelly [397 U.S. 254 (1970)], *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so."

The essence of the holding in *Board of Regents v. Roth, supra*, was that the barrenness of any substantiation of a right to reappointment, indeed of any provision for reappointment whatsoever, made Roth's claim too insubstantial to warrant a due process hearing. Here, insubstantiality cannot be raised against petitioner's claims—the written signed letters pledging service to earn a November 1982 retirement, the president's response pledging cooperation to that end through mutual planning, the necessarily implied role of a reappointment for the 1981/1982 contract year, the *sine qua non* for such a retirement; the acknowledged conference of April 30, 1980 at which Bykofsky claims utterance of a promise by Hess to reappoint for the 1981/1982 contract year—an act required by University regulation to be accomplished by notice given on *or before* May 1, 1981; Bykofsky's immediate and timely request for a prior hearing based on breach of the college president's promise, and for reappointment under the 1981/1982 contract. In contrast to Roth's situation, nowhere can it be said that Bykofsky's claims were so lacking in substance and the issues so incapable of being found in his favor, that he lacked constitutional entitlement to a pretermination hearing.

A gratuitous violation of petitioner's due process rights—ignored by the State appellate courts—was effectively to terminate his salary and salaried services after May 18, 1981 even though, undisputably, that contract had a termination date of June 30, 1981. This, too, violated the due process protection of his property in the unexpired portion of the contract term, and whatever the State courts may have said with respect to the bar of the statute of frauds, no such bar applies to that deprivation, whether direct or

with respect to retirement benefits. Thus *Board of Regents v. Roth*, 408 U.S. 564, 576, 577 (1972):

> "Similarly in the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions, Slochower v. Board of Education, 350 U.S. 551, and college professors and staff members dismissed during the terms of their contracts, Wieman v. Updegraff, 344 U.S. 183, have interests in continued employment that are safeguarded by due process."

It follows that even if the State court holding with respect to the bar of the statute of frauds were held unavoidably binding with respect to Bykofsky's claims to reappointment and his rights to a hearing thereon, the unwarranted abridgement of his 1980/1981 contract, on review by this Court of the issue of contracts as constitutionally protected property, is sufficient to save to him the benefits of being a prevailing party with respect to recovery and to costs within the meaning of 42 U.S.C. §1988.

Even so, while reference to State law is surely a source and most frequently the determinant of a claimed property right, not always is that rule applied *strictissimi* to stifle claims which are not violative of public policy and also fit in with concepts of what ought to be constitutionally protected. Thus again there is *Board of Regents v. Roth, supra*, at 577:

> "*** Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208."

Hess' reassurances to petitioner on April 30, May 1, 1980 had lulled him into a sense of security from which, without warning, he was jolted by the termination notice of April 27, 1981. He had been working through the 1980/1981 contract year and anticipating continuity through 1981/1982. Hence the termination notice found him unprepared for that eventuality and disarmed from being able to find any suitable equivalent. Given that state of affairs, Bykofsky certainly had a tenable argument for a pre-termination hearing where he could have legitimately urged the State doctrine of promissory estoppel—the same as he did in the State courts.

Of promissory estoppel, *Buddman Distributors, Inc. v. Labatt Importers, Inc.*, 91 AD2d 838, 458 N.Y. Supp. 2d 395 (Appellate Division, 4th Dept. 1982) had this to say:

> "The doctrine of promissory estoppel has been applied to preclude a defendant from pleading the statute of frauds as a defense, but that doctrine is "properly reserved for that limited class of cases where 'the circumstances are such as to render it *unconscionable* to deny' the promise upon which the plaintiff has relied. 3 Williston on Contracts §533A, at 801 (3d ed. 1960) (emphasis added)." (*Philo Smith & Co. v. U.S. Life Corp.*, 554 F.2d 34; see, *Swerdloff v. Mobil Oil Corp.*, 74 A.D.2d 258, 427 N.Y.S.2d 266; see also, *M.H. Metal Products Corp. v. April*, 251 N.Y. 146, 167 N.E. 201; Promissory Estoppel as Basis for Avoidance of Statute of Frauds, Ann. 56 A.L.R.3d 1037; Promissory Estoppel as a Means of Defeating the Statute of Frauds, 44 Fordham L.Rev. 114.) Promissory estoppel has been applied to protect the promisee, who in reliance upon a promise, has suffered "unconsionable injury" (*Monarco v. Lo Greco*, 35 Cal.2d 621, 220 P.2d 737).

> "Whether the agreement is one that is removed from the operation of the statute of frauds under the holding in *Weiner v. McGraw-Hill* (supra), [57 NY2d 458, 457 N.Y. Supp. 2d 193, 443 N.E.2d 441 (1982)] and whether the circumstances are so egregious as to render it unconscionable to permit the defendant to invoke the statute of frauds, are questions that should not be determined on the pleadings, but should await a full determination of the facts upon the trial."

It is relatively rare nowadays to find trial level courts acting in the interests of procedural due process, i.e., insisting upon a return of the severed employee to the *status quo ante* the severance as the remedial first order of business vindicating his procedural right to have had a prior due process hearing. Instead, even a Court as well disposed as Special Term in this instance, will more likely hold the matter for a plenary trial of the issue upon which the entitlement was to a due process hearing *before* the separation, thus making the employee go through a chancy trial that, no matter how happy the results may turn out to be, most certainly eliminates and destroys an almost absolute constitutional right to a prior hearing.

For the reasons stated in *Armstrong v. Manzo,* 380 U.S. 545 (1965) we feel that should this Court grant certiorari on the issue of the capacity of contracts to generate "property" protected by the due process clause of the Fourteenth Amendment, it would also represent a needed opportunity to explicate the important distinctions between procedural and substantive due process.

CONCLUSION

For the foregoing reasons, petitioner earnestly prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

MILTON HOROWITZ,
Counsel for Petitioner
15 Park Row
New York, NY 10038
(212) 267-0606

Dated: August 29, 1985

APPENDIX 1

DECISION, JUNE 6, 1985 OF SUMMARY AFFIRMANCE BY THE COURT OF APPEALS OF THE STATE OF NEW YORK, 65 NY2d 730, __ N.Y. Supp. 2d __, OF THE ORDER HEREIN OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

2 No. 372

Irving R. Bykofsky,

Appellant,

v.

Robert L. Hess, as President of Brooklyn College of the City University of New York, et al.,

Respondents.

On review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (107 AD2d 779).

Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur. Judge Titone took no part.

Decision Court of Appeals June 6, 1985.

APPENDIX 2

MEMORANDUM OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT, JANUARY 28, 1985, 107 AD2d 779; 484 N.Y. Supp. 2d 839.

LEON D. LAZER, J.P.
GUY A. MANGANO
DAVID T. GIBBONS
FRANK D. O'CONNOR, JJ.

__AD2d__ A-December 17, 1984

2294E Irving R. Bykofsky, respondent,
v. Robert L. Hess, as President
of Brooklyn College of the City
University of New York, et al.,
appellants.

Robert Abrams, Attorney-General, New York, N.Y. (Stanley A. Camhi and Andrea Green of counsel), for appellants.

Milton Horowitz, New York, N.Y., for respondent.

In an action pursuant to section 1983 of title 42 of the United States Code challenging defendants' failure to renew plaintiff's employment contract for an administrative position at Brooklyn College for the 1981-1982 school year as a deprivation of his constitutional rights to procedural and substantive due process, defendants appeal from so much of an order of the Supreme Court, Kings County, dated September 12, 1983, as denied their motion to dismiss the complaint pursuant to CPLR 3211 (subd. [a], pars. 2, 5, 7).

Order reversed insofar as appealed from, on the law, without costs or disbursements, and that branch of defendants' motion which is to dismiss the complaint pursuant to CPLR 3211 (subd. [a], par. 7) granted.

Plaintiff is an attorney with a long history of public service in various positions in New York City government and the City University of New York (hereinafter CUNY). He held his last such position, as a Higher Education Officer/Assistant Administrator/Director of Community Affairs at Brooklyn College, until the termination of his employment at the end of the 1980-1981 academic year. That termination is the subject of the instant action. Plaintiff's position of Higher Education Officer was one of a group of positions at CUNY which was expressly excluded from the collective bargaining agreement with the professional staff organization and carried no tenure rights. The university personnel policy for staff members excluded from the collective bargaining agreement stated that individuals in the Higher Education Officer series "are eligible for annual appointments and reappointments on a fiscal year basis. The dates of notice for excluded employees in the Higher Education Officer* * *series shall be on or before June 1 for the first year of appointment or fraction thereof and on or before May 1 for any such subsequent appointments".

In the spring of 1980, plaintiff's wife was suffering from a serious illness and he determined that it was important to retire from his position with CUNY no earlier than November, 1982, when he would have 25 years of total credited service with the New York

City Teachers' Retirement System. Retirement at an earlier date would mean a substantial loss in medical insurance and retirement benefits, as well as salary. On April 30, 1980, plaintiff had a personal meeting with Dr. Robert l. Hess, who had recently been appointed to the presidency of Brooklyn College, to discuss his family situation and his need to remain on the staff until November, 1982. According to plaintiff, Dr. Hess assured him during the April 30 meeting that he would reappoint him to his position for the next two successive academic years. Dr. Hess allegedly agreed with plaintiff that this understanding would be memorialized in writing by a letter from plaintiff announcing his intention to retire in November, 1982 and several letters from Dr. Hess, reappointing plaintiff to his position for the 1980-1981 academic year, realigning his position under a different office within Brooklyn College, and expressing his co-operation in effectuating plaintiff's retirement in November, 1982. According to Dr. Hess, however, when plaintiff discussed his need to remain on staff for at least two addtional academic years in order to retire in November, 1982, he agreed only to review plaintiff's contract for the 1980-1981 academic year and asked him to submit his future plans in writing. Dr. Hess denied entering into any agreement or understanding with plaintiff to reappoint him for two, successive, one-year contracts, beginning July 1, 1980, and ending June 30, 1982.

Following the April 30, 1980, meeting, Dr. Hess and plaintiff exchanged a number of letters. In a letter dated April 30, 1980, plaintiff informed Dr. Hess that he wished to retire from the CUNY system in November, 1982, due to the pressures of personal problems. Dr. Hess wrote three letters to plaintiff, all

dated May 1, 1980. The first letter confirmed that plaintiff's position at Brooklyn College was being realigned with another office and the second informed plaintiff that he was being recommended for reappointment to his position as a Higher Education Officer/Assistant Administrator/Director of Community Affairs for the period of July 1, 1980 through June 30, 1981. The final letter read, in pertinent part, as follows: "I appreciate your letting me know of your intention to retire in November of 1982. Will you please keep me informed as your plans materialize so that we may plan appropriately". Dr. Hess denied that the above three letters were intended to memorialize an agreement he reached with plaintiff during their April 30, 1980, meeting, as no such agreement existed.

By letter dated April 27, 1981, Dr. Hess informed plaintiff that he was unable to recommend him to the Board of Trustees at CUNY for reappointment to his position at Brooklyn College beyond June 30, 1981. Plaintiff was also informed by the administration of Brooklyn College that he would have to take all of his accrued annual leave by his termination date, June 30, 1981, so that his last day of actual work would be May 18, 1981.

On or about December 8, 1981, plaintiff commenced the instant action asserting that defendants' determinations not to renew his contract for the 1981-1982 school year and requiring him to use all of his accrued annual leave prior to the end of his last contract on June 30, 1981 deprived him of a property interest in his position in violation of his substantive and procedural rights to due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution and section 6 of article 1 of the New York Constitu-

tion. Plaintiff asserted jurisdiction for the Federal constitutional claims pursuant to section 1983 of title 42 of the United States Code.

We conclude that Special Term erroneously denied the branch of defendants' motion which was to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (subd. [a], par. 7). Plaintiff has failed to establish that he had a constitutionally protected property interest which is cognizable under the due process clauses of the Federal and State Constitutions. In *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, the Supreme Court of the United States stated that constitutionally protected property interest "are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (see, also, *Bishop v. Wood*, 426 U.S. 341, 344-345, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684). This position was adopted by the New York Court of Appeals in *Matter of Economico v. Village of Pelham*, 50 N.Y.2d 120, 126, 428 N.Y.S.2d 213, 405 N.E.2d 694, stating, "[t]he public policy of the State, by the terms of its statutes, regulations and common law, defines the scope and contours" of a property interest which qualifies for constitutional protection under the due process clause (see, also, *Matter of Bergamini v. Manhattan & Bronx Surface T. Operating Auth.*, 62 N.Y.2d 897, 899, 478 N.Y.S.2d 857, 467 N.E.2d 521; *Matter of Voorhis v. Warwick Val. Cent. School Dist.*, 92 A.D.2d 571, 459 N.Y.S.2d 325; *Matter of Thomas v. New York Temporary State Comm. on Regulation of Lobbying*, 83 A.D.2d 723, 442 N.Y.S.2d 632, affd. 56 N.Y.2d 656, 451 N.Y.S.2d 708, 436 N.E.2d 1310). Although a con-

stitutionally protected property interest may arise from informal "rules or mutually explicit understandings" promulgated or fostered by a government agency, which confer upon its employees a legitimate claim of entitlement to continued employment (see *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570), plaintiff has failed to establish the existence of any university-wide policy at CUNY, written or unwritten, which grants to employees in the Higher Education Officer classification tenure rights or any other such guarantees of job security. Indeed, the written policy statement for employees excluded from the collective bargaining agreement promulgated by CUNY explicitly indicates that staff members in plaintiff's Higher Education Officer classification are not eligible for tenure and may be reappointed for one year contracts on an annual basis by the university administration, in a manner similar to the nontenured university professor at issue in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, *supra*. That decision, and a line of similar cases from the Federal courts and courts of this State, have held that public employees, like plaintiff, who lack tenured status conferred either by formal statues or rules, or by informal agency-wide policies, may be terminated from their positions without the procedural protections associated with the due process clause, namely, a statement of reasons and a prior hearing (see *Bishop v. Wood, supra; Longarzo v. Anker*, 578 F.2d 469; *Matter of Bergamini v. Manhattan Bronx Surface Tr. Operating Auth., supra; Matter of Voorhis v. Warwick Val. Cent. School Dist, supra; Matter of Stanziale v. Executive Dept., Off. of Gen. Servs.*, 55 N.Y.2d 735, 447 N.Y.S.2d 150, 431 N.E.2d 635; *Matter of Thomas v. New York Temporary State Comm. on Regulation of Lobbying,*

supra). Plaintiff's alleged personal informal understanding with Dr. Hess concerning his retention for the next two successive academic years does not assume the dimensions of a constitutionally protected property interest, created by statute, regulation or government policy which can form the basis for a cognizable claim pursuant to section 1983 of title 42 of the United States Code for violations of his right to due process of law.

[2] Plaintiff may not maintain what is essentially a common law action to recover damages for breach of contract in the form of a civil rights action to redress deprivations of his Federal constitutional rights pursuant to section 1983 of title 42 of the United States Code. Moreover, Dr. Hess's alleged oral promise to reappoint plaintiff for two successive one year terms is unenforceable pursuant to the Statute of Frauds (see General Obligations Law, §5-701, subd. a, par. 1; *Ginsberg v. Fairfield-Noble Corp.*, 81 A.D.2d 318, 319, 440 N.Y.S.2d 222; *Chase v. United Hosp.*, 60 A.D.2d 558, 400 N.Y.S.2d 343; *Whitehill v. Maimonides School*, 53 A.D.2d 568, 384 N.Y.S.2d 818; *Hanan v. Corning Glass Works*, 35 A.D.2d 697, 314 N.Y.S.2d 804; but see *Weiner v. McGraw-Hill, Inc.*, 57 N.Y.2d 458, 463, 457 N.Y.S.2d 193, 443 N.E.2d 441). Nor did the letters exchanged between Dr. Hess and plaintiff following their April 30, 1980, meeting memorialize the terms of their alleged agreement in writing, so as to create an enforceable contract. The letters written by Dr. Hess omitted an essential term of that agreement, his alleged promise to reappoint plaintiff for the 1981-1982 academic year so that he could retire in November, 1982 (see *Marcraft Recreation Corp. v. Devlin Co.*, 506 F.Supp. 1081, 1085). In the absence of an enforceable oral or written contract of employ-

ment, as was held to exist in *Weiner v. McGraw-Hill, Inc. (supra)*, the Court of Appeals has declined to recognize a common-law cause of action, sounding in tort, for abusive discharge (see *Murphy v. American Home Prods. Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86).

Accordingly, the order is reversed insofar as appealed from, and the complaint dismissed for failure to state a cause of action (see CPLR 3211, subd. [a], par. 7).

APPENDIX 3—ORDER OF APPELLATE DIVISION, JANUARY 28, 1985, REVERSING MEMORANDUM ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 28, 1985

HON. LEON D. LAZER, Justice Presiding,
HON. GUY J. MANGANO,
HON. DAVID T. GIBBONS,
HON. FRANK D. O'CONNOR, *Associate Justices.*

Irving R. Bykofsky,

Respondent,

v.

Robert L. Hess, as President of Brooklyn College of the City University of New York, et al.,

Appellants.

In the above entitled action pursuant to section 1983 of title 42 of the United States Code challenging defendants' failure to renew plaintiff's employment contract for an administrative position at Brooklyn College for the 1981-1982 school year as a deprivation of his constitutional rights to procedural and substantive due process, the above named Robert L. Hess, as President of Brooklyn College of the City University of New York, et al., defendants, having appealed to this court from so much of an order of the Supreme Court, Kings County, dated September 12, 1983, as

denied their motion to dismiss the complaint pursuant to CPLR 3211 (subd [a], pars 2, 5, 7); and the said appeal having been argued by Lisa R. Dell, Esq., of counsel for appellants and argued by Milton Horowitz, Esq., of counsel for respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the order insofar as appealed from is hereby unanimously reversed, on the law, without costs or disbursements, and that branch of defendants' motion which is to dismiss the complaint pursuant to CPLR 3211 (subd [a], par 7) is hereby granted.

Enter: IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX 4—MEMORANDUM ORDER OF SUPREME COURT, KINGS COUNTY AT SPECIAL TERM, SEPTEMBER 12, 1983

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 12th day of September, 1983.

PRESENT:
HON. IRVING S. ARONIN,
Justice.

IRVING R. BYKOFSKY,

Plaintiff

-against-

ROBERT L. HESS, as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES of the City University of New York,

Defendants.

The following papers numbered 1 to __ read on this motion

Papers Numbered

***

Upon the foregoing papers, defendants' motion to dismiss the complaint and the plaintiff's cross-motion for partial summary judgment are each denied.

Defendants' motion for dismissal is predicated on the grounds that the complaint fails to state a cause of action (CPLR 3211[a]7) and that the action is barred

by the statute of limitations and the statute of frauds (CPLR 3211[a]5). The court finds that the allegations in the complaint pertaining to the defendants' failure to renew plaintiff's contract of employment as Assistant Administrator and Director of Community Affairs of Brooklyn College state a cognizable cause of action under the federal Civil Rights Act of 1871, i.e., 42 U.S.C. §1983 (see *Owen v. City of Independence*, 445 US 622). The complaint sufficiently alleges that the plaintiff had a property interest in continued employment by virtue of a promise that he would be reappointed for the 1981-1982 school year, which fact would proscribe summary dismissal (which in this case is the equivalent of non-renewal) from public employment without a due process hearing (*Board of Regents v. Roth*, 408 US 564, 576-577; *Perry Sindermann*, 408 US 593, 601-603).

As to the defendants' statute of limitations defense, defendants' reliance on the four-month period of limitation applicable to article 78 proceedings (CPLR 217) as a bar of this action is misplaced. Since the suit was brought under 42 U.S.C. §1983, the three-year time period provided in CPLR 214, subdivision 2 governs (*Singleton v. City of New York*, 632 F2d 185, 189-191; *Pauk v. Board of Trustees of the City University of New York*, 654 F2d 856 [both 2d Cir. cases]). This action was commenced well within the three-year period.

The third ground asserted by the defendant—statute of frauds—does not constitute a valid defense to an action under 42 U.S.C. §1983 (*Newbern v. Lake Lorelei, Inc.*, 308 F. Supp. 407, 416). Defendants' other contention in their memoranda of law, albeit not in their notice of motion, are equally without merit.

Plaintiff's cross-motion for partial summary judgment is denied because the papers submitted herein raise a triable issue of fact as to the defendants' alleged promise to reappoint the plaintiff for the 1981-1982 school year.

E N T E R,

s/ ISA
J.S.C.

APPENDIX 5—ORDER AND FINAL JUDGMENT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, JUNE 6, 1985, HERE SOUGHT TO BE REVIEWED

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Sol Wachtler, Chief Judge, Presiding

2 No. 372
Irving R. Bykofsky,

Appellant,

v.

Robert L. Hess, as President of Brooklyn College of the City University of New York, et al.,

Respondents.

The appellant in the above entitled appeal appeared by Milton Horowitz, Esq.; the respondents appeared by Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that on review of submissions pursuant to section 500.4 of the Rules, order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division. Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander concur. Judge Titone took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Kings County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of

Appeals and that the papers required to be filed are attached.

s/ Donald M. Sheraw
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 6, 1985.

APPENDIX 6—COMPLAINT, VERIFIED DECEMBER 5, 1981

SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

IRVING R. BYKOFSKY,

Plaintiff,

-against-

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Defendants.

Plaintiff, by MILTON HOROWITZ, his attorney, complains of the defendants and alleges:

FOR A FIRST CAUSE OF ACTION

1. This cause of action is brought by plaintiff against defendants, collectively his public employer, for redress against and remediation for the violation and deprivation by the defendants, their servants, agents and employees, of plaintiff's procedural and substantive due process "property" rights, as the same are protected by the Fourteenth Amendment of the Constitution of the United States, to plaintiff's contractual employment in the position of Director of Community Affairs of Brooklyn College, a position in the category of Higher Education Officer as defined in Section 11.17 of the By-Laws of the City University of New York.

2. This cause of action is statutory and is brought

under the federal Civil Rights Act of 1871, as amended; 42 U.S.C. §1983 and as the same is augmented by 42 U.S.C. §1988.

3. Plaintiff has had a long service career with the City of New York—in itself a subdivision of the Government of the State of New York—directly, and with several of said City's departments and political subdivisions. Save for a three year hiatus from 1969 through 1971 when plaintiff was employed as Administrative Director of the Medical Department of the Workmen's Circle, a Jewish fraternal benefit organization operating throughout the United States and Canada, he has been continuously, since 1954 and until his termination in 1981, serving his public employer. From 1954 to 1962 plaintiff was employed as Legislative Counsel to the President of the Council of the City of New York; from 1962 until 1968 as Assistant to the President of the Borough of Brooklyn; from 1971 (and before) until 1976 first as Adjunct Lecturer at the Community College of Applied Arts and Sciences of the City University of New York ("CUNY"), and then as Adjunct Professor at Brooklyn College of CUNY; and thereafter, until plaintiff's termination in 1981, as Higher Education Officer/Assistant Administrator/Director of Community Affairs of Brooklyn College of CUNY.

4. Since January 1st, 1972 plaintiff has been covered for retirement and related benefits by the City of New York Teachers' Retirement System and officially credited by that System for 14 years, 1 month and 10 days of New York City service rendered prior to that date, all with the force and effect of establishing November 20, 1957 as the starting date for computing the length of plaintiff's covered service under the eligibility requirements of said System.

5. The position held by plaintiff in 1980 and 1981 and for several years prior thereto—Higher Education Officer—is part of the "Administrator Series" of positions in component institutions of CUNY which are expressly excluded from both collective bargaining representation and coverage by any collective bargaining agreement with CUNY. And while the collective bargaining agreement, heretofore and currently, between CUNY and the Professional Staff Congress expressly excludes the category in which plaintiff's position belonged, still certain of the provisions of the Professional Staff Congress agreement, principally setting forth economic substantive benefits, were and are, by resolution of the Trustee defendants, extended to cover those categories of positions, inclusive of plaintiff's, otherwise explicitly excluded.

6. Plaintiff, like others similarly situated in the categories excluded from collective bargaining, had neither tenure nor a position that generates tenure. Instead his rights to hold and keep his position are and were created, contained and expressed in a series of contracts, annual in term with exceptions not applicable here, running from July 1st of the contract year to and including the following June 30th. The CUNY Personnel Policy, promulgated by the University Chancellor provides, in pertinent part:

"1. ***

"c. *HEO and Business Manager Series*

Excluded employees in the Higher Education Office or Business Manager series are eligible for annual appointments and reappointments on a fiscal year basis. The dates of notice for excluded employees in the Higher Education Officer and Business Manager series shall be on or before June 1 for the first year of

appointment or fraction thereof and on or before May 1 for any subsequent appointment."

and:

"2. *Non-reappointment or removal* ****

"c. *HEO and Business Manager Series*
Persons shall be notified on non-reappointment not later than June 1 in the first year of service and May 1 in all subsequent years. ***"

7. By the Spring of 1980 plaintiff's wife was suffering from complete and irreversible renal failure necessitating life-sustaining continuous ambulatory peritoneal dialysis. The consequent economic dilemma facing plaintiff in his employment was that, if he elected to retire upon completion of his July 1, 1979—June 30, 1980 contract, his date of retirement, starting in November 1980 by reason of the running of accrued terminal leaves, would leave him with only 23 years of service, and an election to take immediate retirement benefits would represent about 20% less avails than he would get were his retirement to become effective on a 25 year service base in November 1982. True, by deferring the payment of retirement benefits to the 25th anniversary of coverage in November 1982, the loss of the periodic amount of the benefit, albeit on a base average not inclusive of the salary increments for the July 1, 1980 and 1981 fiscal years, would not be nearly as great, but it would necessitate a ruinous two years loss of health benefits ordinarily provided in unbroken succession by the public employer and the Retirement System. Manifestly if plaintiff could be reappointed to his position under annual contracts effective successively on July 1, 1980 and on July 1, 1981, his contract service, running to June 30, 1982, would enable

him to retire effective November 1982 on a 25 year service basis and without interruption of the medical service benefits.

9. Apprising them of his problem and of his need for two more years of contract service leading to retirement effective in November 1982, plaintiff, in April 1980, enlisted the aid and assistance of Mr. Harold Jacobs, then Chairman of the New York City Board of Higher Education, and of Rabbi Benjamin Z. Kreitmen. Each of these gentlemen spoke personally to defendant Robert L. Hess, the newly installed President of Brooklyn College, urging that plaintiff be kept in service through reappointments so as to enable him to retire on a 25 year service basis in November 1982. Plaintiff had such a conference with defendant Hess on April 30, 1980. In each of these conferences, defendant Hess stated, promised and reassured Mr. Jacobs, Rabbi Kreitman and the plaintiff himself that, barring some intervening circumstance mandating otherwise, he would reappoint the plaintiff for each of the next two successive years so as to enable plaintiff to retire effective November 1982.

10. So reassured, plaintiff continued in the discharge of the duties of his contractual position in a manner earning him the commendation and congratulations of defendant Hess. By letter of May 1, 1980, defendant Hess advised plaintiff that he had recommended plaintiff's reappointment for the contract year July 1, 1980 through June 30, 1981 to the defendants Board of Trustees.

11. However, by signed letter of defendant Hess dated April 27, 1981 sent by certified mail bearing a

Pitney-Bowes postmark of April 30, 1981 and delivered on May 5, 1981, plaintiff was advised as follows:

> "I regret to inform you that after careful consideration I am unable to recommend you to the Board of Trustees of the City University of New York for reappointment as Higher Education Officer/Assistant Administrator/Director of Community Affairs beyond June 30, 1981."

12. By hand delivered letter of May 6, 1981 plaintiff requested that the refusal to reappoint be treated as a grievance under procedures prescribed by the collective bargaining agreement, and that the substance of his grievance was the untimeliness of the notice of non-reappointment, and

> "2. Breach of agreement made April 30, 1980 between the president and the grievant that grievant's employment would terminate at the time of his retirement in fiscal year 1981-1982."

and concluding:

> "In light of the foregoing, I hereby seek rectification of the above violations and I seek the remedy of my reappointment to my position at the college for fiscal year 1981-1982."

By letter dated May 15, 1981, defendant Hess' Assistant for Legal Affairs declined to allow the matter to be bindingly resolved as a grievance. Nor would defendant Hess treat the grievance as a request for review to be referred to defendants Board of Trustees' Vice Chancellor for Faculty and Staff Relations under section 3 of aforementioned CUNY Personnel Policy.

13. The aforesaid notice of non-reappointment letter of defendant Hess without the allowance of a pre-termination hearing to plaintiff was not only a breach and deprivation of the plaintiff's contractual property right to a reappointment for the fiscal year July 1, 1981 through June 30, 1982 promised by defendant Hess, but was also, as applied by defendant Hess, a destruction of plaintiff's property rights, under the July 1, 1980—June 30, 1981 contract, to hold his position thereunder and be compensated therefore for the duration of the entire contract term. For defendant Hess directed that plaintiff cease work after May 18, 1981 and thereafter suffer the loss of his regular salary for the balance of the contract year so that plaintiff would be forced to subsist on the proceeds of terminal leaves prematurely made to commence on May 19, 1981 rather than July 1, 1981 as required by law and his existing contract, and with the result that employer payments of salary (and of terminal leave benfits equal to salary) ended on September 29, 1981 rather than on November 15, 1981 had plaintiff's contract been allowed to run to June 30, 1981, the end of its term.

14. Although plaintiff protested the truncating breach of his contractual term of employment and continued to work until the end of his contract term:

> "Since my contract ends on June 30, 1981, I receive wages until that date. Accrued annual leave and travia leave must be exhausted, in that order, after June 30th. To arbitrarily state that my annual leave begins on May 19th deprives me of my earned property rights without due process and due compensation therefore. * * * In the light of the above, I shall continue working until the last day of my contract.";

the response of defendant Hess was brutally coercive in its insistence and duress in compelling the forfeiture of salary earned on May 19, 1981 through June 30, 1981 upon threat of destroying plaintiff's remaining terminal leave altogether:

"June 29, 1981

"This is to advise you that unless your application for travia leave is received immediately, you will be removed from the payroll as of July 1, 1981. To review the facts:

"Your annual leave started on May 19, 1981, and will conclude on June 30, 1981.

"If you file the application for leave form, travia leave will commence on July 1, 1981 and conclude on September 29, 1981."

Plaintiff, in submitting the application, noted thereon that it was being submitted under duress and under protest.

15. The foregoing compulsion of forfeiture and the forced acceptance of "leave" in lieu of contract salary from May 19, 1981 was all the more reprehensible because, in an identical situation involving Brooklyn College as the employer, the New York State Department of Labor had administratively ruled, on May 11, 1981:

"The credible evidence establishes that claimant was effectively terminated as of April 6, 1981. Clai-

mant had he completed the term of his contract after June 30, 1981 would have been paid for accrued annual leave. The employer without permission of claimant *** directed that claimant use his accumulated annual leave to pay off the balance of the term of his contract. I am persuaded that the money received by claimant after April 6 constituted severance pay and not annual leave ***."

16. All of the foregoing illegal, coercive and confiscatory acts of the defendants, as public employer of the plaintiff, were violative of the Fourteenth Amendment of the United States Constitution in that plaintiff was effectively thereby deprived of his property interest both in the contractual undertaking of the defendants to reappoint plaintiff for the contractual term July 1, 1981 through June 30, 1982, and in his having the full benefit of the one year contract under which he was serving when wrongfully terminated, both of said deprivations of plaintiff's contractual vocational property rights without due process of law, procedural and substantive.

17. By reason of the foregoing plaintiff is entitled by 42 U.S.C. §§1983 and 1988 to the following:

a) Forthwith reinstatement to his former position at Brooklyn College, there to remain until and including June 30, 1982 unless sooner validly terminated after a hearing, with full declaratory and injunctive relief in implementation thereof;

b) Full back pay with applicable increments from May 19, 1981 less any amounts earned by plaintiff in full time gainful employment during the period covered by back pay but without diminution of plaintiff's basis for retirement benefits;

c) Full rectification of entitlement to leaves, medical insurance, and retirement benefits, the same as though plaintiff had continued uninterrupted in his employment in said position through June 30, 1982 and with subsequent accrued annual leave plus travia leave thereafter.

d) An award of a reasonable counsel fee to plaintiff under 42 U.S.C. §1988.

FOR A SECOND CAUSE OF ACTION

18. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered 3 through 16 hereof with the same force and effect as though herein set forth fully and at length.

19. The said acts of defendants with respect to plaintiff's contractual vocational rights were, additionally to those alleged in the First Cause of Action herein, also violative of plaintiff's due process rights, both procedurally and substantively, under Article I, section 6 of the Constitution of the State of New York.

20. The acts of defendants hereinbefore alleged violated and breached a) defendants' contractual undertaking to reappoint plaintiff to his position at Brooklyn College for the contract year July 1, 1981 through June 30, 1982, and b) defendants' contract of employment of plaintiff from July 1, 1980 through June 30, 1981 by involuntary termination of his employment before the end of the contract term.

21. Plaintiff has performed all conditions of said agreement to reappoint him for the year commencing July 1, 1981, and of his contract of employment covering July 1, 1980 through June 30, 1981, on his part to be performed, except to the extent that due perfor-

mance thereunder has been prevented by acts of the defendants in breach thereof.

22 Plaintiff is entitled under this Second Cause of Action to the full range of remediation set forth in paragraph numbered "17" of this Complaint, with the exception of the allowance of a counsel fee.

WHEREFORE, plaintiff demands judgment against defendants and all of them as follows granting:

a) Declaratory and injunctive relief directing defendants to reinstate plaintiff forthwith to his former position at Brooklyn College of the City University of New York for the balance of the contract year remaining until and including June 30, 1982 unless sooner terminated after a hearing before this Court;

b) Full back pay from May 19, 1981 until plaintiff is reinstated to his former position at Brooklyn College and restored to regular payroll;

c) Rectification and restoration of plaintiff's entitlement to leaves, medical insurance, retirements benefits and other fringe benefits and emoluments, if any, the same as though plaintiff had continued uninterrupted in his position under contract through June 30, 1982;

d) An award of a reasonable counsel fee to plaintiff under 42 U.S.C. §1988;

e) An award of interest on all moneys awarded herein to plaintiff, the same to run from the dates of accrual; and

f) The costs of the action.

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Verified December 5, 1981

No. 85-361

Supreme Court, U.S.
FILED
OCT 31 1985
JOSEPH SPANIOL, JR
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

IRVING R. BYKOFSKY,

Petitioner,

against

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

MEMORANDUM IN OPPOSITION

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BEST AVAILABLE COPY

No. 85-361

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MEMORANDUM IN OPPOSITION

Petitioner was an administrator at Brooklyn College of the City University of New York until the close of the 1980-81 academic year when his employment contract was not renewed. Appendix to the petition ("pet. app.") 3a. He seeks review of a judgment of the New York Court of Appeals which summarily affirmed the dismissal of his civil rights complaint by the Appellate Division of the Supreme Court for failure to state a cause of action. Pet. app. 9a, 15a. The complaint alleged that respondents' failure to

renew petitioner's contract for the 1981-82 academic year denied him due process of law. Pet. app. 2a.

The petition is insufficient because it does not give any reason under Supreme Court Rule 17(1) for granting review. No conflict with a decision of a federal court of appeals or a state court of last resort is alleged. Moreover, applicable decisions of this Court in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972), establish that petitioner did not have a protected due process interest in the renewal of his employment contract with Brooklyn College.

In *Board of Regents* v. *Roth*, this Court said that property interests are created and their dimensions defined by existing rules and understandings that stem from an independent source such as state law. 408 U.S. at 577. Thus, Roth's property interest in employment was created and defined by the terms of his appointment, which, like those of petitioner here, did not secure any interest in re-employment for the following year. 408 U.S. at 578; pet. app. 6a-7a. In *Perry* v. *Sindermann*, this Court said that a property interest could arise from a *de facto* tenure program as evidenced by a college's written guidelines. 408 U.S. at 600. Here, the Appellate Division found that the written policy in effect at Brooklyn College stated explicitly that administrators in petitioner's job classification were only entitled to consideration for one year contracts and that no other written or unwritten policies granted any interest in continued employment. Pet. app. 7a.

Vail v. *Board of Education of Paris Union School District No. 95*, 706 F.2d 1435 (7th Cir., 1983), affirmed by

an equally divided court, —— U.S. ——, 104 S.Ct. 2144 (1984) (*per curiam*), is readily distinguishable. There, the Seventh Circuit upheld a district court finding that a college athletic director had a protected due process interest in continued employment when he was terminated after working for one year under an undisputed promise of employment for two years. 706 F.2d at 1438. Here, the Appellate Division found that petitioner's last annual appointment under the written policy in effect at Brooklyn College expired at the close of the 1980-81 academic year. Pet. app. 3a.

The Appellate Division further found, as a matter of law, that petitioner's reliance on an exchange of letters with with respondent Hess in April and May 1980 and an alleged contemporaneous oral understanding to reappoint him for the 1981-82 academic year did not create a protected due process interest. Pet. app. 8a. According to the court, the exchange of letters did not include a promise to reappoint petitioner for 1981-82, and any alleged oral understanding to reappoint him for that academic year was unenforceable under the state Statute of Frauds. *Ibid.*; New York General Obligations Law § 5-70(a)(1) (McKinney 1978).

Thus, the state law issues and underlying facts decided in petitioner's favor by the lower courts in *Vail* were decided adversely to petitioner here. Neither can be reviewed by this Court. *Fox Film Corp.* v. *Muller,* 296 U.S. 207, 210-211 (1935) (state court decisions based on adequate nonfederal grounds will not be reviewed); *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967) (concurrent findings of fact will not be reviewed absent obvious error). As a result, petitioner here, unlike petitioner in *Vail,* cannot show this Court any independent state law

source for a protected due process interest in his reappointment for the 1981-82 academic year.

The same result follows if petitioner is claiming that respondent Hess only promised to cooperate in his reappointment effort. Petition at i, 8. Since the April and May 1980 exchange of letters does not include a promise of any kind (*id.* at 8-10), and any oral understanding would be unenforceable, petitioner cannot allege more than a subjective expectancy in continued employment which this Court has said is without constitutional dimension. *Perry* v. *Sindermann,* 408 U.S. at 603.

Therefore, the petition for writ of certiorari should be denied.

Dated: New York, New York
October 29, 1985

Respectfully submitted,

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Supreme Court, U.S.
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No. 85-361

In The Supreme Court of the United States

October Term, 1985

IRVING R. BYKOFSKY,

Petitioner,

-vs-

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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APPENDIX

Text of the Court of Appeals official report of *Bykofsky v. Hess,* found only in 65 NY2d 730, and not duplicated in the unofficial reports 1a

No. 85-361

In The
Supreme Court of the United States

October Term, 1985

IRVING R. BYKOFSKY,

Petitioner,

-vs-

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

STATEMENT

The rhetoric of respondents' opposition cannot disguise that petitioner here claims, with considerable substantiation, that the president of Brooklyn College, vested with the power effectively to recommend annual reappointments, had pledged his cooperation in keeping petitioner employed in his public position sufficient to enable him to retire on a 25 year service basis in November 1982, and that the highest Court of the State of New York has held, as a matter of constitutional law, that such an understanding, in and of itself, cannot generate a property interest within the due process protections of our Constitution's Fourteenth Amendment.

the promise to reappoint plaintiff for two years," seems to give sanction to the clever use of language by a college president, in his May 1, 1980 letter—simultaneous with his May 1, 1980 letter reappointing petitioner for the 1980/1981 contract year—to lull petitioner with false assurance while concealing his real intentions:

> "I appreciate your letting me know of your intention to retire in November of 1982. Will you please keep me informed as your plans materialize so that we may plan appropriately." (Petition, p. 8)

But as we have urged in our petition, even if it were to turn out that the statute of frauds was an insuperable State law bar to ultimate recovery by petitioner, the claim of the State of New York that contracts relating to public employment cannot, in and of themselves, generate property rights covered by the due process of law protections of the Fourteenth Amendment and are therefore not capable of forming the basis for remedial 42 U.S.C. §1983 actions, is, we feel, too grave an onslought against constitutional restraints on State power to escape this Court's review nor to gain authoritative status in the public mind because certiorari was denied.

CONCLUSION

For the foregoing reasons, as well as those expressed in our petition, petitioner earnestly prays for the grant of a writ of certiorari herein.

Respectfully submitted,

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Dated: November 5, 1985

APPENDIX TO PETITIONER'S REPLY BRIEF

TEXT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK OFFICIAL REPORT OF *BYKOFSKY V. HESS*, FOUND ONLY IN 65 NY2d 730 (1985) AND NOT DUPLICATED IN THE UNOFFICIAL REPORTS

65 New York Reports, 2d Series 730

IRVING R. BYKOFSKY, Appellant v. ROBERT L. HESS, as President of Brooklyn College, et al., Respondents.

Decided June 6, 1985

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 28, 1985 which (1) reversed, on the law, an order of the Supreme Court at Special Term (Irving S. Aronin, J.), entered in Kings County, denying defendants' motion to dismiss the complaint and denying plaintiff's cross motion for partial summary judgment, and (2) granted that branch of defendants' motion to dismiss the complaint for failure to state a cause of action.

Plaintiff commenced the instant action pursuant to 42 USC §1983 to challenge defendants' failure to renew plaintiff's employment contract for an administrative position at Brooklyn College for the 1981-1982 school year. Plaintiff, an attorney with a long history of service in various positions in New York City government and the City University of New York (CUNY), held his last position, Higher Educa-

tion Officer/Assistant Administrator/Director of Community Affairs at Brooklyn College, until the termination of his employment at the end of the 1980-1981 academic year. Plaintiff's position was one of a group of positions at CUNY which was expressly excluded from the collective bargaining agreement with the professional staff organization and carried no tenure rights. In the spring of 1980, plaintiff's wife was suffering from a serious illness and plaintiff determined that it was important to retire from CUNY no earlier than November 1982, when he would have 25 years of total credited service with the New York City Teachers' Retirement System. On April 30, 1980, plaintiff met with defendant Dr. Robert Hess, who had recently been appointed president of the college, to discuss his situation. According to plaintiff, Dr. Hess assured him that he would reappoint him for the next two successive academic years. Dr. Hess allegedly agreed that their understanding would be memorialized in writing by a letter from plaintiff announcing his intention to retire, and several letters from Dr. Hess reappointing plaintiff to his position for the 1980-1981 academic year, realigning his position under a different office within the college, and expressing Dr. Hess' cooperation in effectuating plaintiff's retirement in November 1982. However, according to Dr. Hess, when he met with plaintiff he agreed only to review plaintiff's contract for the upcoming year and asked plaintiff to submit his future plans in writing; Dr. Hess denied entering into any agreement to reappoint plaintiff for two successive one-year contracts. By letter dated April 27, 1981. Hess informed plaintiff that he was unable to recommend him for reappointment. In December 1981, plaintiff commenced the instant action asserting that defendants' determination not renew his contract deprived him of a property in-

terest in his position in violation of his substantive and procedural rights to due process of law guaranteed by the State and Federal Constitutions.

The Appellate Division concluded that plaintiff had failed to establish that he had a constitutionally protected property interest which was cognizable under the Constitution; that although a constitutionally protected property interest may arise from informal "rules or mutually explicit understandings" promulgated or fostered by a legitimate claim of entitlement to continued employment, plaintiff failed to establish the existence of any university-wide policy at CUNY, written or unwritten, which granted to employees in his classification tenure rights or any other such guarantees of job security; that plaintiff's alleged personal informal understanding with Dr. Hess concerning his retention did not assume the dimensions of a constitutionally protected property interest, created by statute, regulation or government policy which could form the basis for a Federal civil rights action, and that plaintiff could not maintain what was essentially a common-law action to recover damages for breach of contract in the form of a civil rights action where Dr. Hess' alleged oral promise was unenforceable pursuant to the Statute of Frauds, and where the letters exchanged between Dr. Hess and plaintiff did not memorialize the terms of their purported agreement since they omitted an essential term of that "agreement", i.e., the promise to reappoint plaitiff for two years.

Bykofsky v. Hess, 107 AD2d 779, affirmed.

HEADNOTE

Colleges and Universities — Administrative Personnel — Discharge from Employment

In an action in which plaintiff alleged that a college's refusal to renew his contract of employment was a deprivation of his property rights in violation of 42 USC §1983, an order of the Appellate Division, which reversed an order denying summary judgment to defendants and granted the motion to dismiss for failure to state a cause of action, is affirmed for the reason stated in the memorandum at the Appellate Division, which concluded that plaintiff, an administrator, had no tenure rights and that he had failed to establish that he had a protected property interest which was cognizable under the due process clauses of the Federal and State Constitutions.

APPEARANCES OF COUNSEL

Milton Horowitz for appellant.

Robert Abrams, Attorney-General (Lisa R. Dell, of Counsel), for respondents.

OPINION OF THE COURT

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (107 AD2d 779).

Concur: Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander. Taking no part: Judge Titone.